(1)
Supreme Court, U.S.
FILED
97-971665 APR 10 1998
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**GABE KAIMOWITZ,**

Petitioner,

vs.

**ORLANDO, FLORIDA,**

Respondent.

**On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

**JOHNIE A. McLEOD***
McLEOD, McLEOD,
& McLEOD, P.A.
P.O. 950, 48 E. Main St.
Apopka, Florida 32703
(407) 886-3300
Attorney(s) for Petitioner
*Counsel of Record

97 PP

## QUESTIONS PRESENTED FOR REVIEW

1. Did opinions and orders below in the Eleventh Circuit conflict with a longstanding decision of this Court by their denial of any form of hearing or oral argument for an attorney in good standing to show how allegations of handcuffing and false arrest after his removal from a city council session related to a False Claims Act action he filed against Orlando, Florida, or to a damage action arising from similar municipal wrongdoing, in which he sought to intervene for himself and those similarly situated?

2. Did the Eleventh Circuit sanction such a departure of proceedings in the Orlando Division of the U.S. District Court for the Middle District of Florida, as to call for an exercise of the Supreme Court's power of supervision to assure meaningful access to the federal judicial system for a whistle-blower whose views admittedly are contrary to prevailing beliefs about a locale perceived perhaps worldwide as being comparatively free of institutional racism and corruption, because of name association with Disney World attractions?

## PARTIES

This petition is on behalf of Gabe Kaimowitz, an attorney proceeding below in a False Claims Act action against Orlando, Florida. He later tried unsuccessfully to intervene in a damage action against that municipality. Only the municipality was a proper party in the relevant proceedings below in the U.S. Court of Appeals for the Eleventh Circuit.

However, in the False Claims Act action, Petitioner is pursuing an appeal on the merits from a grant of summary judgment, without oral argument or evidentiary hearing, for all defendants including Orlando City Planner Rick Bernhardt and Orlando Neighborhood Improvement Corporation ("ONIC") established in 1985. The United States Department of Justice duly considered but declined to intervene in the False Claims Act action, although its counsel monitored all pre-trial district court proceedings from March, 1994, to March, 1997.

In the damage action, Hal Noyes, a computer engineer, like Petitioner, was falsely arrested and detained by a city police officer while he was engaged in protected First Amendment activity. After Petitioner was denied intervention for injunctive and declaratory relief on behalf of all persons similarly situated, Mr. Noyes voluntarily withdrew his action with prejudice before any appearance was filed for the police officer Daniel Nessim or the municipality. Because of the foregoing, this petition is also is being served on counsel for ONIC, the U.S. Department of Justice, and Hal Noyes. Petitioner already has served all relevant papers on appeal in the damage action concerning Mr. Noyes and Mr. Nessim to Orlando's counsel in the False Claims Act action . That attorney will be served as counsel for Orlando, Florida, here.

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

CITATIONS BELOW.....2

JURISDICTION.....4

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED.....5

STATEMENT OF THE CASE.....17

REASONS FOR GRANTING THE WRIT.....22

I. To Avoid Hearings, The Eleventh Circuit Has Decided A Federal Question In Conflict With An Applicable Long-Standing Decision Of The United States Supreme Court About The Requisites Of Judicial Procedural Protection For Exercise Of First Amendment Rights.....22

II. The Eleventh Circuit Sanctioned A Departure So Far From Accepted And Usual Course Of Judicial Proceedings By One District Court Division, As To Call For An Extension Of The Supreme Court's Power To Assure Meaningful Access To The Federal Judicial System.....26

CONCLUSION.....30

*Page*
APPENDIX.....1-a

## TABLE OF AUTHORITIES

**Cases cited:**

*Bell v. Wayne Co. Gen. Hspt.*,
384 F.2d 1085 (E.D./W.D. Mich. 1974).....29

*California Motor Transport Co. v. Trucking Unlimited*,
404 U.S. 508 (1972).....30

*Catalano v. NYC Dept. of Hospitals*,
299 F.2d 166 (S.D.N.Y. 1969).....29

*Cate v. Oldham*,
707 F.2d 1176 (11th Cir. 1983).....22

*Chambers v. Baltimore & Ohio Railroad*,
207 U.S. 142 (1907).....30

*Childree v. UAP/GA AG Chem, Inc.*,
92 F.2d 1140 (11th Cir. 1996).....24

*Cheffer v. McGregor*,
6 F.3d 705 (11th Cir. 1993), vacated.....25
41 F.3d 1421 (11th Cir. 1994).....25

*Copeland v. Green*,
949 F.2d 390 (11th Cir. 1991).....27

*Diversified Numismatics v. Orlando, Fla.*,
949 F.2d 382 (11th Cir. 1991).....18

*Elrod v. Burns*,
427 U.S. 347 (1976).....22,24

*Page*

*In re McDonald*,
489 U.S. 180 (1989).....28

*Kaimowitz v. Bd. of Gov. of the Federal Reserve*,
940 F.2d 610 (11th Cir. 1991).....18

*Kaimowitz v. Bd. of Trustees of the U. of Illinois*,
951 F.2d 765 (7th Cir. 1991).....18

*Kaimowitz v. Duke Law Journal*,
315 S.E.2d 82 (N.C. App. 1984).....18

*Kaimowitz v. Mich. Dept. of Mental Health*,
42 U.S.L.W. 2063 ( Cir. Ct.Wayne Co.,
Mich. 1973).....18

*Kaimowitz v. Orlando, Fla.*.....1,25,28
#96-2307 (11th Cir. 1996), also cited.....4
122 F.3d 41 (11th Cir. 1997) modified.....passim
131 F.3d 950 (11th Cir. 1997).....passim
#95-204-Civ-Orl-19 (M.D. Fla. 1994).....2,28

*Kaimowitz, qui tam, ex rel United States,*
*v. Orlando, Fla., et al.*,
#97-2777, (11th Cir. 1997).....passim

*Kaimowitz v. The Florida Bar*,
996 F.2d 1151 (11th Cir. 1993).....28

*Lonchar v. Thomas*,
– U.S. –, 116 S.Ct. 1293 (1996).....29

*Madsen v. Women's Health Cir., Inc.*,
– U.S. –. 114 S.Ct. 2516 (1994).....25

*Page*

*Martin-Trigona v. Shaw,*
986 F.2d 1384 (11th Cir. 1993).....27

*Neal v. Honeywell, Inc.,*
33 F.3d 860 (7th Cir. 1994).....24

*Noyes v. Orlando, Fla., Kaimowitz, Movant*.....1,28
#97-254-Civ-Orl-22 (M.D. Fla. 1997)..... 3,4,20
#97-2600 (11th Cir. 1997), appeal..... passim
#97-2458 (11th Cir. 1997), petition for writ..passim

*Parham v. J.R.,*
442 U.S. 594 (1978).....18

*Robertson v. Bell Helicopter Textron, Inc.,*
32 F.3d 948 (5th Cir. 1994).....24

*Rozar v. Mullis,*
85 F.3d 556 (11th Cir. 1996).....25

*Shealy v. City of Albany, Ga.,*
89 F.3d 804 (11th Cir. 1996).....26

*United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Fla., et al.*, #95-204-Civ-Orl-19..... 2,20
(M.D. Fla. 1994 [sic])..... 3

*United States ex rel Rasmeyer v. Century Healthcare Corp.*
90 F.3d 1514 (10th Cir. 1996).....24

*Washington Shores Homeowners Assn v. Orlando,*
#88-962-Civ-Orl-20/22(M.D. Fla. 1998).....4,18

*Washington Shores Homeowners Assn. v. Orlando,*
602 S.2d 1300 (Fla. 1992).....18

*Page*

**U.S. Constitution, Statutes, Rules Cited**:

First Amendment, U.S. Constitution.....passim

Fifth Amendment, U.S. Constitution.....5

Fourteenth Amendment, U.S. Constitution.....5

Civil Rights Act, 42 U.S.C. § 1983.....6

Civil Rights Act, 42 U.S.C. §1985(2)..... 7,23

False Claims Act, 31 U.S.C. § 3729,
as Amended (1986).....5

False Claims Act ("FCA") 31 U.S.C. § 3730 (b),(c),
as Amended (1986).....passim

False Claims Act, 31 U.S.C. § 3730 (h).....6

Judiciary and Judicial Procedure, 28 U.S.C. § 144.....7

Judiciary and Judicial Procedure, 28 U.S.C. § 455.....8

Judiciary and Judicial Procedure, 28 U.S.C. § 1254...4

Judiciary and Judicial Procedure, 28 U.S.C. § 1292...8

Supreme Court Rule 12.2.....8

Fed. R. App. P. 27.....9

*Page*

Fed. R. App. P. 26(b).....10-12

11th Cir. R. 26-1.....10

11th Cir. R. 27-1..... 11,12

11th Cir. R. 42-1.....10,11

Fed. R. Civ. P. 5(b).....13

Fed. R. Civ. P. 6(d).....17

Fed. R. Civ. P. 15(a).....14

Fed. R. Civ. P. 24.....11

Fed. R. Civ. P. 65.....14,15

Local Rule 4.05(b)(1) to (5).....16,17

Local Rule 4.06 U.S. D. Ct., M.D. Fla.....15

**Other Authorities Cited**:

Wright, Miller & Kane, *Federal Practice & Procedure*, Civil 2d § 2949.....23,24

**Miscellaneous Cited**:

Blankenship, "Reputations aren't hypothetical, retreat tells lawyers," *The Florida Bar News*, Aug. 1, 1996.....28

No. 97-

In The

# Supreme Court of the United States

October Term, 1997

**GABE KAIMOWITZ,**

Petitioner,

vs.

**ORLANDO, FLORIDA,**

Respondent.

**On Petition For A Writ Of Certiorari To The Eleventh Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Gabe Kaimowitz, respectfully prays that a writ of certiorari issue to review the judgments, opinions and orders of the United States Court of Appeals for the Eleventh Circuit entered on September 15 and November 20, 1997, in *Gabe Kaimowitz v. Orlando, FL*, and on February 6, 1998 and March 2, 1998, in *Hal Noyes v. Orlando, FL, Gabe Kaimowitz as Movant.*

## CITATIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit in *Kaimowitz v. Orlando, Florida*, are published at 122 F.3d 41 (11th Cir. 1997), modified at 131 F.3d 950 (11th Cir. 1997). A lower court order was affirmed in the first opinion on Sept. 15, 1997. Modification was done on Nov. 20, 1997, with a denial of rehearing and denial of suggestion for hearing en banc. See placement herewith according to listing in the Table of Contents for the Appendix.

The orders and judgments of the United States Court of Appeals for the Eleventh Circuit, in *Hal Noyes v. Orlando, Florida* (*Gabe Kaimowitz as Movant or Petitioner*), are unreported. That is a case in the same court involving identical or closely related questions to *Kaimowitz v. Orlando, supra*. A petition for writ of mandamus, #97-2458 was dismissed as moot on Oct. 10, 1997; the appeal #97-2600 was dismissed by order of the court on Feb. 6, 1998, and rehearing or reinstatement of the appeal was denied on March 2, 1998. See placement herewith according to the listing in the Table of Contents for the Appendix.

The lower court orders, opinions and judgments in the United States District Court for the Middle District of Florida in both cases likewise are unreported. *Kaimowitz v. Orlando, supra*, was an appeal from a denial of preliminary injunction in a False Claims Act action, *United States ex rel Gabe Kaimowitz, qui tam, v. Orlando, et al.*, #95-204-Civ-Orl-19, (M.D. Fla. Orlando Division, Mar. 10, 1995) transferred from #94-284-Civ-J-10 (M.D. Fla. Jacksonville Division, Mar. 25, 1994). See placement of relevant orders, etc., herewith according to the listing in the Table of Contents for the Appendix. An appeal on the merits from summary judgment without hearing or oral argument has been docketed as #97-2777 in the United States Court of Appeals for the Eleventh

Circuit on Aug. 13, 1997 and briefing commenced. See placement herewith according to the listing in the Table of Contents for the Appendix. However, those issues are not ripe for this petition. *Hal Noyes v. Orlando, supra*, #97-254-Civ-Orl-22 (M.D. Fla. Orlando Division, 1997), was first brought to the attention of the United States Court of Appeals for the Eleventh Circuit by the petition for writ of mandamus.

From *Kaimowitz v. Orlando, supra*, chronologically are *Order* for Change of Venue, from the United States Court for the Middle District of Florida, Jacksonville Division, in *United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Florida, et al*, 94-284-Civ-J-10, *supra*, Feb. 27, 1995, by Judge W. T. Hodges; *Order* for Denial of Recusal of Judges Resident in Orlando and the Senior Magistrate if Change of Venue is Allowed on Reconsideration, *United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Florida, et al.*, 95-204-Civ-Orl-19, *supra*, March 15, 1995, by Judge Patricia C. Fawsett; *Order* of Denial of Reconsideration of Change of Venue, *id.*, March 16, 1995, by Judge Fawsett; *Order* of Denial of Rule 11 Sanctions, *id.*, June 15, 1995 by Judge Fawsett; *Order* of Denial of Filing of First Amended Complaint and for Preliminary Relief, *id.*, Jan. 29, 1996, by Judge Fawsett; *Order* of Denial of Unopposed Motion for Reconsideration of Recusal, *id.*, Aug. 23, 1996, by Judge Fawsett. Since preliminary relief was sought from a false arrest by Orlando of Gabe Kaimowitz, excerpts are included from an Oct. 31, 1995 Orlando Police Department Arrest Report submitted by Petitioner with his an Affidavit in the trial court in support of preliminary relief ; See also Docket Entry Excerpts, *United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Florida, et al. supra*, from the Certificate of Readiness on Appeal, through Aug. 27, 1997, to reflect chronology of filings relevant to this petition from the Complaint, March 25, 1994.

See placement herewith according to the listing in the Table of Contents for the Appendix From *Hal Noyes v. Orlando, supra*, chronologically from the U.S. District Court, Middle District of Florida, Orlando Division, are an *Order* denying intervention and striking claim, Apr. 14, 1997, by Judge Anne C. Conway; Mr. Noyes' Notice of Voluntary Dismissal, *id.*, May 2, 1997, with *the Final Order of Dismissal, id.*, May 5, 1997, by Judge Conway.

See also *Order* granting recusal by Judge Conway because her impartiality could be questioned toward Gabe Kaimowitz in his only other appearance before her, in *Washington Shores Homeowners Association, et al., vs. City of Orlando*, #88-962-Civ-Orl-22 (M.D. Fla. 1988), on Sept. 27, 1993. See placement of aforementioned orders, etc., herewith according to the listing in the Table of Contents for the Appendix. See also therein Docket Record Excerpts from this action as well on appeal.

## JURISDICTION

The final order and judgment of the Court of Appeals in *Kaimowitz v. Orlando*, #96-2307, 122 F.3d 41, *supra*, were entered on Sept. 15, 1997, Appendix, at p. 1a, and issued as a mandate, Dec. 19, 1997, after denial of a petition for rehearing and suggestion for rehearing *en banc* on Nov. 20, 1997, *id.*, at 131 F.3d 950, *supra*. On Feb. 13, 1998, Justice Anthony Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including March 17, 1998, *Appendix*, at p. 54a, and on March 17, 1998, further extended the time to April 10, 1998, *id.*, at p. 55a. This petition also is timely filed from the final judgment and dismissal in *Hal Noyes v. Orlando, supra*, on Feb. 6, 1998, and denial or rehearing or reinstatement on appeal, March 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

—

The Fifth Amendment to the United States Constitution provides in pertinent part:

No persons shall...be deprived of life, liberty or property without due process of law....

—

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—

The False Claims Act, 31 United States Code ("U.S.C.") § 3730, as amended in 1986, provides in pertinent part:

**(b) Actions by private persons**. (1) A person may bring a civil action for a violation of section 3279 for the person and for the United States Government. The action shall be brought in the name of the Government....

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.....

**(c) Rights of the parties to qui tam actions**....(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action....When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause....

**(h)** Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including an investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination....An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

—

Section 1983 of 42 U.S.C. provides in pertinent part:

**Civil action for deprivation of rights**. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any such rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Section 1985 and 1985(2) of 42 U.S.C. provide:

**Conspiracy to interfere with civil rights....(2) Obstructing justice; intimidating party, witness or juror**. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified...or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;....the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one...of the conspirators.

—

Section 144 of 28 U.S.C. provides:

**Bias or prejudice of judge**. Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455 of 28 U.S.C. provides in pertinent part:

**Disqualification of justice, judge, or magistrate (a)** Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

**(b)** He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

—

Section 1292 of 28 U.S.C. provides in pertinent part:

**Interlocutory decisions**. (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;....

—

Rule 12.2 of the Rules of The Supreme Court provides in pertinent part:

REVIEW ON CERTIORARI; HOW SOUGHT; PARTIES:....2....When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. A petition for a writ of certiorari shall not be joined with any other pleading.

—

Rule 27 of the Federal Rules of Appellate Procedure ("F.R.App.P.") provides in pertinent part:

**Motions: (a)** *Content of motions; response.*--Unless another form is elsewhere prescribed by these rules, an application for an order or relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion....

**(b)** *Determination of motions for procedural orders.* -- Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

**(c)** *Power of a single judge to entertain motions.* -- In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief, which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

**(d)** *Form of Papers; Number of Copies.*--All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 26(b) of the F.R.App.P. provides in pertinent part:

**(b)** *Enlargement of time.* -- The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any action, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal; petition for allowance, or a petition for permission to appeal.....

---

11th Circuit Rule ("11th Cir. R.") 26-1 also provides:

Motion for Extension of Time. A motion for extension of time made pursuant to FRAP 26(b) shall contain a statement that movant's counsel has consulted opposing counsel and that either opposing counsel has no objection to the relief sought, or will or will not promptly file an objection....

Internal Operating Procedure ("I.O.P.") 1. *Extensions of Time. The court requires the timely filing of all papers within the time period of time allowed by the rules, without granting extensions of time, except upon submission of documentary evidence of extraordinary circumstances (e.g. court dockets or calendars which establish insoluble conflicts, medical evidence of illness). Failure to process an appeal timely may cause it to be dismissed for want of prosecution, under the provisions of 11th Cir. R. 42-1(b)....*

---

11th Cir. R. 42-1. provides in pertinent part:

(b) Dismissal for Failure to Prosecute. Where appellant fails to file the record or a brief or otherwise fails to comply with rules requiring processing an appeal (or other proceeding) to hearing, the clerk shall issue a notice to counsel, or to appellant if the appearance is pro se, that upon expiration of 14 days from the date thereof the appeal (or other proceeding) will be dismissed for want of prosecution if the default has not been remedied. A party in default must seek leave of the court, by appropriate motion, to file documents out of time or otherwise remedy the default. Failure to seek such relief by filing an appropriate motion shall be considered a continuation of the

default and may result in dismissal by the clerk. The clerk shall not dismiss an appeal (or other proceeding) during the pendency of a timely filed motion to file documents out of time or otherwise remedy the default, but if the court denies such leave the clerk shall dismiss the appeal (or other proceeding) forthwith....

(c) Other. In lieu of the procedures described in (b), the court may take such other or different action as it deems appropriate.

(d) Mandate. A copy of an order dismissing an appeal for want of prosecution shall be issued to the clerk of the district court as the mandate.

---

11th Cir.Ct.R. 27-1 provides in pertinent part:

Motions. (a) Form of Motion. (1) Motions must be made in writing with proof of service on all parties. Motions should ordinarily be served on other parties by means which are as equally expeditious as those used to file the motion with the court....

(2) A motion shall be accompanied by, and the opposing party shall be served with, supporting documentation required by FRAP 27, including relevant materials from previous judicial or administrative proceedings in the case. A party moving for a stay must include a copy of the judgment or order from which relief is sought and any opinion and findings of the district court.

] (3) In addition to matters required by FRAP 27, a motion shall contain a brief recitation of prior actions of this or any other court or judge to which the motion or a substantially similar or related application for relief has been made.

(4) A motion for extension of time made pursuant to FRAP 26(b) shall, and other motions where appropriate may, contain a statement that movant's counsel has consulted opposing counsel and that either opposing counsel has no objection to the relief sought, or will or will not promptly file an objection....

(6) All motions filed with the court shall include a Certificate of Interested Persons and Corporate Disclosure Statement....except for unopposed motions for procedural orders as described in 11th Cir. R. 27-1(c).

(7) An original and three copies of a motion and supporting papers must be filed if the motion requires panel action. An original and one copy of a motion and supporting papers must be filed if the motion may be acted upon by a single judge or by the clerk....

(c) Motions for Procedural Orders Acted Upon by the Clerk. The clerk is authorized, subject to review by the court, to act for the court on the following unopposed procedural motions:

(1) to extend the time for filing briefs, answers, objections, or replies to pending motions in cases not yet assigned or under submission....

(d) Motions Acted Upon by a Single Judge. Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceedings. Without limiting this authority, a single judge is authorized to act, subject to review by the court, on the following motions:

(1) where opposed, motions that are subject to action by the clerk under part (c) of this rule;...

(7) to extend the times prescribed by the rules of this court for good cause shown (note that FRAP 26(b) forbids the court to enlarge the time for taking various actions, including the time for filing a notice of appeal)....

(e) Motions Shall Not Be Argued. Unless ordered by the court no motion shall be orally argued.

(f) Effect of a Ruling on a Motion. A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the case is assigned on the merits, and the merits panel may alter, amend or vacate it.

Rule 24 of the Federal Rules of Civil Procedure ("F.R.Civ.P.") provides in pertinent part:

**(a) Intervention of Right**. Upon timely application anyone shall be permitted to intervene in an action:...(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**(b) Permissive Intervention**. Upon timely application, anyone may be permitted to intervene in an action:...(2) when an applicant's claim or defense and the main action have a question of law or fact in common....In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

**(c) Procedure**. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought....

—

Rule 5 of the F.R.Civ.P. provides in pertinent part:

**Service and Filing of Pleadings and Other Papers**....

**(b) Same. How Made**. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with a clerk of the court....Service by mail is complete upon mailing.

Rule 15 of the F.R.Civ.P. provides in pertinent part:

**Amended and Supplemental Pleadings**

**(a) Amendments**. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served....Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

---

Rule 65 of the F.R.Civ.P. provides in pertinent part:

**(a) Preliminary Injunction**. (1) *Notice*. No preliminary injunction shall be issued without notice to the adverse party. (2) *Consolidation of Hearing With Trial on Merits*. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application....

**(b) Temporary Restraining Order; Notice; Hearing; Duration.** A(n) order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from the specific facts shown by affidavit, or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing, the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. ....In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character....

**(c) Security**. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or

suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an office or agency thereof.

**(d) Form and Scope of Injunction or Restraining Order**. Every order granting an injunction....shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

—

Local Rule 4.06 of the U.S. District Court for the Middle District of Florida provides in pertinent part:

**PRELIMINARY INJUNCTIONS**. **(a)** A preliminary injunction may not be issued absent notice (Rule 65(a)(1), Fed.R.Civ.P.), which must be given at least five (5) days in advance of the hearing (Rule 6(d), Fed.R.Civ.P.).

**(b)** All hearings scheduled on applications for a preliminary injunction will be limited in the usual course to argument of counsel unless the Court grants express leave to the contrary in advance of the hearing pursuant to Rule 43(e), Fed.R.Civ.P.. In order to develop a record and the positions of the parties in advance of the hearing, the following procedure shall apply:

(1) The party applying for the preliminary injunction shall fully comply with the procedural requirements of Rule 4.05(b)(1) through (b)(5) of these rules pertaining to temporary restraining orders.

(2) Service of all papers and affidavits upon which the moving party intends to rely must be made at least five (5) full days prior to the hearing (Rule 6(d), Fed.R.Civ.P.).

(3) The party or parties opposing the application must file with the Clerk's Office, and deliver to the moving party, all

counter or opposing affidavits, and a responsive brief, not later than the close of business on the day preceding the hearing (Rule 6(d) Fed.R.Civ.P.).

(4) Lengthy briefs, affidavits and other papers are counterproductive and should be avoided. If the parties desire additional time to prepare, and so stipulate in writing, the scheduled hearing may be postponed....In the event the hearing is postponed, any additional papers must be filed in advance of the rescheduled hearing according to the time periods specified in paragraphs (2) and (3) above (as required by Rule 6(d), Fed. R.Civ.P.)

---

Local Rule 4.05(b)(1) through (b)(5) of the U.S. District Court for the Middle District of Florida provides in pertinent part:

**TEMPORARY RESTRAINING ORDERS**....

**(b)**...(1) The request for the issuance of the temporary restraining order should be made by a separate motion entitled "**Motion for Temporary Restraining Order**."

(2) The motion must be supported by allegations of specific facts shown in the verified complaint or accompanying affidavits, not only that the moving party is threatened with irreparable injury, but that such injury is so imminent that notice and a hearing on the application for preliminary injunction is impracticable if not impossible....

(3) The motion should also: (i) describe precisely the conduct sought to be enjoined; (ii) set forth facts on which the Court can make a reasoned determination as to the amount of security which must be posted pursuant to Rule 65(c), Fed.R.Civ.P.; (iii) be accompanied by a proposed form of... order prepared in strict accordance with the several requirements contained in Rule 65(b) and (d), Fed.R.Civ.P.; and (iv) should contain or be accompanied by a supporting legal memorandum or brief.

(4) The brief or legal memorandum submitted in support of the motion must address the following issues: (i) the

likelihood that the moving party will ultimately prevail on the merits of the claim; (ii) the irreparable nature of the threatened injury...; (iii) the potential harm that might be caused to the opposing parties or others if the order is issued; and (iv) the public interest, if any.

(5)...In addition to the summons, complaint and...order, the papers served must also include all motions, briefs, affidavits and exhibits submitted to the Court, as well as such additional affidavits or other papers upon which the moving party will rely in seeking...a preliminary injunction. The hearing will usually be scheduled within ten (10) days....

Rule 6(d) of the F.R.Civ.P. provides in pertinent part: **Time....(d) For Motions--Affidavits**. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court....When a motion is supported by affidavit, the affidavit shall be served with the motion....

## STATEMENT OF THE CASE

Petitioner, an attorney practicing in the federal judicial system in courts in five circuits since 1969, filed a False Claims Act ("FCA") action against Orlando, Fla., its planning director Richard Bernhardt, and an Orlando Neighborhood Improvement Corporation ("ONIC") they created in 1985. The action was filed in Jacksonville on March 25, 1994. He alleged that they knowingly made false claims in applications for grants and privileges to the U.S. Department of Housing and other federal agencies. They were said to have used the federal and related state funding to concentrate blacks, especially the poor among them, in low income housing in a downtown neighborhood ghetto, and to create illusions of non-existent commercial development projects for historically black areas.

Petitioner began to investigate ONIC, its relationship to Orlando, Fla., and banks legally obligated not to discriminate against minority or poor neighborhoods, soon after he arrived in 1985 as appointed executive director of Greater Orlando Area Legal Services, Inc., a federally-funded free legal services program for the eligible poor headquartered in that municipality. Petitioner eventually blew the whistle successfully about discriminatory practices by one lender.[1]

But most of the material was gathered 1988-93 when Petitioner was in private solo practice in Orange County, Fla., primarily during the course of his representation of black groups and members seeking to stop a proposed state highway road extension supported by white City Council members including its former mayor Bill Frederick.[2] Because of their ties to Orlando and its economic support system and/or their antipathy to Petitioner, the three federal judges resident there disqualified themselves in that case[3].

---

1--*Kaimowitz v. Board of Governors of the Federal Reserve*, 940 F.2d 610 (11th Cir. 1991.) Petitioner as whistle-blower often has been successful for himself or others in challenges to improper public and private institutional policies and practices. See also, e.g., *Kaimowitz v. Mich. Dept. of Mental Health*, 42 U.S.L.W. 2063 (Cir. Ct. Wayne Cty., Mich, 1973)(cited *Parham v. J. R.*, 442 U.S. 594. 626, Brennan, J., dissenting [1978]); *Kaimowitz v. Duke Law Journal*, 315 S.E 2d 82 (N.C.App. 1984); *Kaimowitz v. Bd. of Trustees of the University of Illinois*, 951 F.2d 765 (7th Cir. 1991).

2--*Washington Shores Homeowners Association, et al., v. Orlando, et al.*, 88-962-Civ-Orl-20 (M.D. Fla. 1988), also 602 So.2d 1300 (Fla. 1992).

3--Judge G. Kendall Sharp also disqualified himself in three other cases on motion by Petitioner, Judge Patricia C. Fawsett in two others, because of her former partnership with Tom Cardwell, general counsel for the Florida Bankers Association. However, the recusals stopped as the Eleventh Circuit opined that such recusals alone would not suffice to establish bias against counsel, though they might if based on bias against a party, *Diversified Numismatics v. Orlando*, 949 F.2d 382, 384 and n. 2 (11th Cir. 1991). Judge Anne C. Conway, disqualified herself in *Washington Shores, supra*, in 1993.

So Petitioner objected strongly in the FCA action before Judge W. T. Hodges on Feb. 27, 1995, sitting in Jacksonville granted Defendants a change of venue to the Orlando Division. In Jacksonville, Petitioner on March 6, sought reconsideration and a ruling on judicial disqualification if venue were changed to Orlando. But 10 days before the action was transferred to Orlando, Defendants' counsel with a clerk of the court generated a case number there, so that those motions would be heard in the new venue. On June 15, 1995, U.S. Judge Patricia C. Fawsett denied Petitioner sanctions against Defendant counsel but conceded that there had been irregularities in the transfer process. In March, she had disposed of the attempts to keep the case in Jacksonville.

During the processing of the FCA action in 1994-95 in Jacksonville, Judge Hodges[4] found no reason to meet with parties or counsel, even for the change of venue. In the Orlando Division, Judge Fawsett never found any reason to allow counsel or parties to appear in her court in the FCA action. In a half dozen cases filed by Petitioner and assigned to Judge Fawsett since 1990, she has yet to hold a hearing for any purpose at which he could appear in her court. She denied preliminary relief here on Jan. 29, 1996, a month after such an injunction was sought by Petitioner to prevent him from being arrested pursuant to a local ordinance. He had been taken from a City Council session, handcuffed and placed under arrest on Oct. 31, 1995. Continuing to be concerned about such Orlando interference, Petitioner again sought such restraint by trying to intervene for injunctive and declaratory relief in a § 1983 damage action filed against the City by another plaintiff.

---

4. As the district's chief judge, Judge Hodges assigned to himself each of three cases from which the Orlando Division judges had recused themselves, although he eventually assigned other judges for pre-trial and trial proceedings in two. However, Petitioner has never seen Judge Hodges on the bench in any of those cases.

Since the Eleventh Circuit still had not ruled on his appeal from Judge Fawsett's denial of preliminary relief without hearing, Petitioner moved to intervene in the damage action for Hal Noyes, and demand relief for himself and others similarly situated who were subjected to interference with First Amendment rights by Orlando. Noyes alleged he had been falsely arrested and imprisoned for handing out leaflets on Orlando public property. Petitioner had learned about the case and about an apparent pattern and practice of interference with First Amendment rights by Orlando police officers from depositions and news reports. Also, on Feb. 10, 1997, Petitioner again had been escorted from the City Council Chamber and kept outside until the end of the session by four police officers, after his removal was ordered by Mayor Glenda Hood. She had ordered a similar removal and exclusion in 1995. On the second occasion, no arrest was effected. From 1988-93, when Petitioner appeared for the aforementioned African-American groups with frequency, he was removed from the podium and chamber only once, in 1989, but he was allowed to return to the audience without incident.

The *Noyes* civil rights action was assigned to Judge Anne Conway. Petitioner had appeared before her once, in that 1993 case from which she had recused herself. Petitioner had asked her to step down, in part because of financial contributions she had given to Defendant Orlando Mayor Hood. In 1997, when Petitioner tried to intervene in the *Noyes* case, Judge Conway struck his claim, and returned it, and papers for disqualification filed separately. She denied intervention without explanation. The case was closed by May 5, 1997, after Noyes' counsel notified the Court they were voluntarily dismissing the action with prejudice.

The Eleventh Circuit permitted no oral argument in either appeal from the rulings by Judges Fawsett and Conway, or petition for writ of mandamus to reinstate intervention.

On Nov. 26, 1996, Judge Fawsett had granted summary judgment for the Defendants in the FCA action. By March, 1997, that, too, was on appeal. The record on that appeal was docketed on Aug. 13, 1997, at the Eleventh Circuit. Petitioner was notified that his Initial Brief was due 40 days from Sept. 12. On Sept. 15, the Eleventh Circuit affirmed the denial of preliminary relief with published opinion but without oral argument. The decision erroneously stated that the merits had not been resolved as yet below. That error withstood Petitioner's suggestion for rehearing and hearing en banc, although the affirmance was modified on Nov. 20.

On Oct. 7, 1997, Petitioner's appeal from the *Noyes* litigation was docketed. On Oct. 10, Judges Ed Carnes and Lanier Anderson dismissed as moot the petition for writ of mandamus to restore the stricken claim to the record. No one other than the Petitioner and the district court clerk was being notified about any of the Eleventh Circuit *Noyes* actions. Petitioner moved to have the parties below notified of the appeal. On Dec. 2, Judge Joel Dubina denied that motion. On Dec. 5, Petitioner moved for summary reversal and remand for want of an appellee. To Petitioner's knowledge, that motion was not resolved. On Dec. 18, 1997, the Eleventh Circuit notified Petitioner that his Initial Brief and Record Excerpts were due in the *Noyes* appeal 40 days from that date. Petitioner timely moved for an enlargement of time until March 26, 1998, to allow for sufficient time for resolution of his motion for summary reversal and remand. Petitioner had been granted a 30-day extension to file his Initial Brief on the merits in the FCA action. But On Feb. 6, 1998, in the *Noyes* appeal, Judge Carnes denied the motion for enlargement. The Clerk of the Court entered a dismissal as the Eleventh Circuit mandate for the failure to file the Initial Brief and Record Excerpts on time. On Feb. 13, Petitioner filed sufficient copies of those papers with motions to file out of time and for reinstatement. On March 2, Judge Carnes denied the motions.

## REASONS FOR GRANTING THE WRIT

### I. TO AVOID HEARINGS, THE ELEVENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH AN APPLICABLE LONG-STANDING DECISION OF THE UNITED STATES SUPREME COURT ABOUT THE REQUISITES OF JUDICIAL PROCEDURAL PROTECTION FOR EXERCISE OF FIRST AMENDMENT RIGHTS.

The Eleventh Circuit clearly erred in its first reported decision when a panel opined that there was no presumption of harm on a First Amendment claim warranting an evidentiary hearing for preliminary relief, or apparently even oral argument. The Eleventh Circuit stated:

> Generally, evidentiary hearings are required prior to the issuance or denial of a motion for preliminary injunction only where there is a presumption of irreparable harm, as in a Title VII employment discrimination case. (*Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 [11th Cir. 1988] was cited in a note 7.) Because there is no presumption of irreparable harm in this case, the district court did not err in not holding a hearing. AFFIRMED.

*Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997).

In a suggestion for rehearing en banc by Petitioner, he cited Eleventh Circuit precedent, *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983), and lower court decisions requiring a preliminary injunction hearing when claims were made of violations of First Amendment rights. They were relying on a finding in *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) that "(t)he loss of First Amendment freedoms even for minimal periods of time, unquestionably constitutes irreparable injury."

Since *Elrod,* such a hearing is expected on First Amendment matters. So the Eleventh Circuit modified its ruling by deleting those two sentences from *Kaimowitz v. Orlando*, 122 F.3d, *supra*, at 43, The Eleventh Circuit added:

> For the reason discussed above, the record conclusively established that Kaimowitz was not entitled in this suit to the unrelated preliminary injunction he sought, and thus it was clear that an evidentiary hearing was not necessary.

*Kaimowitz v. Orlando,* 131 F.3d 950 (11th Cir. 1997).

Some form of hearing below however would have allowed Petitioner to show how Orlando's interference with his First Amendment rights was intended retaliation against him, precisely because of his filing the FCA action. In violation of 42 U.S.C.§ 1852(2), Orlando audaciously had singled out an adversary in federal court for false arrest. Such interference with a party in a federal court action should have been subjected to immediate hearing, *Kush v. Rutledge*, 460 U.S. 719 (1983). Instead, Judge Fawsett viewed, in camera, over objection, a videotape provided by Orlando ex parte of the Oct. 31, 1995 City Council session. She based a ruling in her denial of preliminary relief order on that viewing. Petitioner contended that relevant facts had to be seen in a broader context. But the trial court disallowed the civil claim as being separate and confusing to the trier of fact in the FCA action.

> Although the Ninth Circuit permits the trial court to exercise discretion to decline to hear testimony even when the facts are controverted (note omitted), most courts hold that when the written evidence reveals a factual dispute, an evidentiary hearing must be provided to any party who requests one.

Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d* § 2949, at p. 228 (1995)(unchanged in 1997 supplement).

Even the Ninth Circuit and other lower courts which may deny oral testimony will permit oral argument, Wright, Miller & Kane, *Federal Practice and Procedure, supra,* § 2949 at n. 44. Oral argument certainly is to be expected on issues of law, *id.*, at pp. 230-231.

Neither the appellate nor the trial court indicated how the record conclusively established that the injunctive relief was not related to the qui tam action, *Kaimowitz v. Orlando*, 122 F.3d, *supra*, at 42. To the extent those judgments imply that no personal action of like nature could ever be brought with a FCA action, it would be contrary to provision of the statute itself, 31 U.S.C. 3730(h), to protect whistle-blowing employees, *U.S. ex rel Rasmeyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951, (5th Cir. 1994), *cert. den.* 115 S.Ct. 1110 (1995); and *Childree v. UAP/GA AG Chem., Inc.*, 92 F.2d 1140, 1144-45 (11th Cir. 1996). Since 1986, the U.S. Congress thus has recognized that retaliation is likely to go with the territory when FCA claims are made.

The Eleventh Circuit by its *Kaimowitz* modification suggests that hearings may depend on how lower courts subjectively assess the merits of FCA or First Amendment claims and their assessment of the parties before they allow hearings for preliminary relief or intervention. Here, after Petitioner was removed in plain view from the audience of a City Council meeting, arrested, handcuffed, and publicly humiliated, as an example to anyone else who dared to accuse Orlando of institutional racism, fraud, or other wrongdoing, the irreparable harm to him and the public should have been obvious. Yet Judge Fawsett waited for a month to decide that the claim was so unrelated to the fraud action that no hearing, no oral argument, was to be allowed. By so ruling, she negated the *Elrod v. Burns* presumption of immediate harm.

On appeal, the Eleventh Circuit did not resolve the preliminary injunction issues including need for some sort of hearing until more than 18 months after the notice of appeal. Then the *Kaimowitz* panel chose to do so by disconnecting them from the appeal already docketed and scheduled for briefing from the judgment on the merits of the FCA action[5]. No oral presentation ever was allowed to the trial judge. The Eleventh Circuit also has shown inclination to limit pre-trial arguments in other cases potentially embarrassing to local authorities. Consolidation was effected in *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996). The *Rozar* panel affirmed summary judgment without hearing. The opinion relied on a hearing held for preliminary relief, in an environmental racism action.

Like the Orlando City Council, the Eleventh Circuit appears willing to adjust procedures to accommodate prevailing public views. For instance, that court did reverse and grant preliminary relief to those acting on beliefs more in keeping with those prevailing in Florida, e.g. abortion clinic protestors charged in state court with trespassing, See, e.g., *Cheffer v. McGregor*, 6 F.3d 705, 710 (11th Cir. 1993), *vacated* 41 F.3d 1421 (11th Cir. 1994), *and remanded* in light of *Madsen v. Women's Health Ctr., Inc.*, -- U.S. --, 114 S.Ct. 2516 (1994). Such underlying substantive issues should not directly affect considerations for some form of hearing immediately when First Amendment issues are raised, unless a claim is frivolous or without basis in fact. Therefore, if *Kaimowitz v. Orlando* published rulings are not reversed, public agencies may be tempted to stifle adversaries now and risk any provable wrongdoing later, out of public view, if they know dissidents will be limited to paper presentation in court.

---

5--Briefing is underway in the Eleventh Circuit on the merits of the appeal from the grant of summary judgment to all Defendants without evidentiary hearing or oral argument on the fraud claims in the FCA case, *Kaimowitz, qui tam, ex rel United States v. Orlando, FL, et al.*, #97-2777 (11th Cir. 1997).

## II. THE ELEVENTH CIRCUIT SANCTIONED A DEPARTURE SO FAR FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY ONE DISTRICT COURT DIVISION, AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION TO ASSURE MEANINGFUL ACCESS TO THE FEDERAL JUDICIAL SYSTEM.

The Eleventh Circuit has permitted judges resident in the Orlando Division in the 1990s to restrict unlawfully the public airing of claims by Petitioner and those he represents about institutional racism and economic deprivation of blacks in their jurisdiction. Judges who recused themselves on his motions from 1988-93 did not disqualify themselves from the FCA action when it was transferred from Jacksonville in 1995, or from Petitioner's attempt to intervene in a damage action to curtail the city's pattern and practice of falsely arresting or interfering with dissidents exercising First Amendment rights on public property. They simply cleared the cases without judicial hearings. The intervention claim was stricken below. A petition for mandamus and a motions were dismissed by orders by one or two judges. The clerk for the Court dismissed the appeal without due process considerations concerning access to justice. Usually intervention, like preliminary relief, in the federal system, requires some form of hearing in the lower court, or the appeals court will reverse and remand, regardless of the merits, as the Eleventh Circuit did for intervenors in a reverse discrimination action dismissed below.

> While we express no views on the merits of their claim, or of the strength of the evidence they sought to introduce, intervenors must be allowed the opportunity to make out their prima facie case.

*Shealy v. City of Albany, Ga.*, 89 F.3d 804, 806 (11th Cir. 1996).

On appeal in *Kaimowitz v. Orlando*, 122 F.3d, *supra*, at 42, the Eleventh Circuit did not mention Petitioner's unlawful arrest and detention, in either of its two published opinions. The Eleventh Circuit insisted review of the FCA first amended complaint was premature, because the merits had not been resolved, despite the fact that Petitioner in a suggestion for rehearing pointed out the Court already had notified the parties to begin briefing the appeal on the FCA claims. Below summary judgment had been entered on them without hearing on Nov. 25, 1996, and reconsideration denied on Feb. 13, 1997. The Eleventh Circuit separately dismissed the petition to restore the *Noyes* intervention claim as moot, presumably because the appeal had caught up with it, and then dismissed the *Noyes* appeal for failure to prosecute, despite every attempt to do so, as soon as notice was given to Petitioner.

The Eleventh Circuit previously has limited access for litigants said to be abusive. They are only entitled to enter the court house to submit papers, *Copeland v. Green*, 949 F.2d 390 (11th Cir. 1991). A judge decides if the papers can be filed. The Circuit has made clear that its lower courts are to be given "considerable" discretion to protect against such litigants, as long as they are not "completely foreclosed from *any* access to the court," *Martin-Trigona v. Shaw*, 986 F.2d 1384, 1387, (11th Cir. 1993). Citing those cases and others developed on point in the Eleventh Circuit, a district judge has stated:

> The Supreme Court has clearly recognized the validity of these judicially ordered curbs on abusive litigation. See *In re McDonald*, 489 U.S. 180, 184, n. 8, 109 S.Ct. 993, 996, n. 8, 103 L.Ed.2d 158 (1989). This circuit has also recognized the power of district courts to strictly control the access which abusive litigants have to judicial resources (cites omitted).

*Washington v. Alaimo*, 934 F. Supp. 1395, 1399 (S.D. Ga. 1996).

Petitioner concedes he may be regarded as a disfavored litigant. He certainly did not endear himself to the judiciary in his five-year unsuccessful attempt to disassociate himself from the legal association to which he must belong, *Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993)[6]. Judges Fawsett and Sharp recused themselves from that matter.

But Petitioner has had no notice or hearing in these cases or any others from the Orlando Division of the U.S. District Court of Florida to show cause why his appearances should not be limited and filings stricken. Instead, without finding Petitioner legally abusive, Orlando Division judges, later affirmed by the Eleventh Circuit, have refused to allow Petitioner meaningful access to the federal court system to place **in context**, in *Kaimowitz v. Orlando, supra*, (a) actions in Orlando to arrest, handcuff and humiliate him, though he is an attorney with 30 years of federal court experience, and in *Noyes v. Orlando, supra*, (b) that city's pattern and practice of ignoring the First Amendment umbrella protecting dissenters.

In his dissent for four justices *In re McDonald*, 489 U.S. 180, 187-188 (1989), Justice Brennan set forth the following which this Court is asked to consider in this reading:

> I am most concerned...that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare,

---

6--"Supreme Court Chief Justice Gerald Kogan summed it up:...'Lawyers will talk about judges they appear in front of,' Kogan noted. 'Well, trial and appellate judges, we talk about you and we know the ones who are going to come in and try to pull the wool over our eyes and we know the ones we can trust. There is not a single case nor is there a single client that is worth you risking your reputation in the legal community for that client or that case. Once you lose your reputation, you will never get it back,'" G. Blankenship, "Reputations aren't hypothetical, retreat tells lawyers," *The Florida Bar News*, Aug. 1, 1996, p. 1.

but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue. *Chessman v. Teets*, 354 U.S. 156 (1957); see *id.*, at 173-177 (Douglas, J. dissenting).

This Court annually receives hundreds of petitions, most but not all of them *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy of the Court's review. Many come from individuals whose mental or emotional stability appears questionable.[7] It does not take us long to identify these petitions as frivolous and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer.

*In re McDonald*, 489 U.S. *supra*, at 187-188.

However, a majority of this Court has been willing to rein in the Eleventh Circuit when a panel there was perceived as going beyond legal and ethical guidelines. This Court declared that such principles must be followed to minimize disparate treatment of similar cases, and thereby help all litigants, *Lonchar v. Thomas*, 116 S.Ct. 1293 (1996).

---

7--Petitioner has represented several said to be legally disabled in need of hearing on preliminary relief by courts in other places and times. *See, eg., Catalano v. Dept. of Hospitals*, 299 F. Supp. 166 (S.D.N.Y. 1969, three-judge court)(institutionalized chroniically ill persons were heard about their rights to retain Social Security checks); *Bell v. Wayne Co. Gen. Hsptl.*, 384 F. Supp. 1085 (E.D./W.D. Mich. 1974)(Michigan Mental Health Code provisions were declared unconstitutional.)

Such a declaration should be echoed here, to assure a right to be heard, a right to meaningful access to U.S. courts:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government....Equality of treatment is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

*Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907).

> Certainly the right to petition extends to all departments of government. The right of access to the courts is indeed but one aspect of the right of petition.

*California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609, 612, 404 U.S. 508 (1972).

## CONCLUSION

For the foregoing reasons, certiorari should be granted to review judgments, opinions, and orders of the Eleventh Circuit, and to reverse them to the extent necessary to assure meaningful access at meaningful times to federal court for Petitioners and those similarly situated.

Respectfully submitted,

JOHNIE A. McLEOD*
McLEOD, McLEOD, &
McLEOD, P.A.
P.O. 950, 48 E. Main St.
Apopka, Florida 32703
(407) 886-3300
Attorney(s) for Petitioner
*Counsel of Record